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No.

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

WILLIAM GEORGE PAYNE,

PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether it is an abuse of the exercise of discretion by the Board of Immigration Appeals to denominate a conviction of possession of narcotic drugs as a "serious drug offense" as a threshold for a requirement of "showing unusual or outstanding countervailing equities by applicants for discretionary relief" pursuant to Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(h) in the light of:

(1) A judgment by the trial court, which convicted the petitioner, withholding a sentence of confinement or imposition of fine and granting him three years probation, finding that, "it appearing to the satisfaction of the court that (petitioner is) not likely again to engage in a criminal course of conduct, and that the ends of justice and welfare of society do not require that (he) should suffer the penalty authorized by law.";

(2) The holding in a precedential decision of the Board of Immigration Appeals that the "seriousness of

a crime" for the purpose of determining eligibility for asylum or withholding of deportation depends upon "such factors as the circumstances and underlying facts of the conviction, the type of sentence imposed, and most importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community" with the sentence as viewed by the State Court "reflecting the seriousness of the applicant's danger to the community."

(3) The discrete distinctions made in the federal statutory framework restricting discretionary benefits under the Immigration and Nationality Act for aliens who have been convicted of manufacturing, trafficking, or sales of narcotic drugs but interposing no such bar upon aliens who have been convicted of simple possession of such drugs.

(4) The purpose of Section 212(c) reflecting the concern of Congress that there be "some degree of flexibility to permit worthy returning aliens to continue their relationships with their family members in the United States" despite a conviction of narcotic offenses, other than those explicitly barred

from discretionary relief.

II. Whether the Court of Appeals has provided the "thorough, probing, in-depth review" of the issues here required by Citizens to Preserve Overton Park v. Volpe, 401 U.S.C. 416 (1971), where the opinion of the court of appeals below reflects no consideration of substantial issues raised, other than "sub silentio" treatment, and has relied upon inapposite cases for its decision.

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WILLIAM GEORGE PAYNE

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v.

IMMIGRATION AND NATURALIZATION SERVICE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming a decision by the Board of Immigration Appeals.

OPINIONS BELOW

The opinion of the court of appeals (App.A, 1a-4a) has been designated to be "unpublished". The opinion of the Board of

Immigration Appeals is set forth at Appendix C 1-7.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 1989, App.B. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).6

STATUTES INVOLVED

Section 212(c) of the Immigration and Nationality Act of 1952, 8 U.S.C.1182(c), provides:

> "Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1) through (25) and paragraphs (30) and (31) of subsection (a) ..."

Section 241(a)(11) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1251(a)(11), provides:

> "Any alien in the United States. . . shall, upon the order of the Attorney General, be deported who -

* * *

> is, or hereafter at any time after entry has been a narcotic drug addict or who at any time has been convicted of a violation of, or a conspiracy to violate any law or regulation, relating to the illicit possession of or traffic in narcotic drugs or marihuana, or who has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction-sustaining opiate[1]/.

West's F.S.A. provides at Section 893.13(1)(e):

> It is unlawful for any person to be in actual or constructive possession of a controlled substance unless such

[1]/The exclusion counterpart of 8 U.S.C. 1251(a)(11) is Section 1182(a)(23). The decision by the Board of Immigration Appeals has treated Section 241(a)(9) as equivalent to the provisions of 8 U.S.C. 1182(a)(23) (R.4). Tapia v. Acuna v. INS, remanded, 449 U.S. 945 (1980)

> controlled substance was lawfully obtained from a practitioner or pursuant to a valid prescription or order of a practitioner while acting in the course of his professional practice or [to be in actual or constructive possession of a controlled substance] except as otherwise authorized by this chapter. Any person who violates this provision is guilty of a felony of the third degree, punishable as provided in Section 775.082, Section 775.083 or Section 775.084.

STATEMENT

The petitioner is a native and citizen of Jamaica, born on August 28, 1953, who was admitted to the United States at age 18 as a lawful permanent resident on May 21, 1971 (R. 179).

On April 18, 1985, he was found guilty in the Circuit Court of Palm Beach County, Florida for possession of cocaine and for possession of marijuana in excess of 20 grams, a lesser included offense, in violation of Florida Statute 893.13(1)(e).

The Court entered a "Judgement (sic) of Guilt and Placing Defendant on Probation" in which the Court adjudged the petitioner to be guilty of the offenses and found regarding the petitioner that:

"It appearing to the satisfaction of the Court that you are not likely again to engage in a criminal course of conduct, and that the ends of justice and welfare of society do not require that you should suffer the penalty authorized by law;

Now, therefore, it is ordered and adjudged that the imposition of sentence is hereby withheld, and that you are placed on probation for a period of three (3) years each count under the supervision of the Department of Corrections and its Officers, such supervision to be subject to the provisions of the laws of this State*. (*"The Court has objections to probation being transferred to Washington D.C.") concurrent to each other (R.170).

On February 21, 1986, the Immigration and Naturalization Service (hereafter "INA"), pursuant to Section 241(a)(11) of the Immigration and Nationality Act, 8 U.S.C. 1251(A)(11), (here at the "INA") initiated deportation proceedings against the petitioner as an alien convicted of a narcotics violation (R. 148). The sole allegation against the petitioner set forth in the Order to Show Cause is the offense of possession of cocaine (R. 148).[2]/

He was found to be deportable on the charge, but

pursuant to Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. Section 1182(c), as construed by Francis v. INS, 532 F.2d 268 (2nd Cir. 1976), the petitioner applied for a waiver of inadmissibility to this country.(R.53)

In support of his application, the petitioner established that he had lived in the United States continuously since his admission as a permanent resident at the age of 18 for a period of 18 years; that he has five dependent children ages 2 through 13 in the United States who are each American citizens(R.73) for whom he provides support(R.73); that his wife, who is mother of three of his children, is a United States citizen (R.114); that he has three brothers and two sisters who are citizens or lawful permanent residents of the United States;

2/See colloquy in the deportation hearing between the immigration judge and counsel reflecting the fact that deportation proceedings are not instituted against an alien who has been convicted of possession of 30 grams or less of marijuana. (R.90) See Section 212(a) of the INS, 8 U.S.C. 1182(h).

(R.74); that he and every member of his family in the United States live within the same general community;

that, except for his son, he has no close family members remaining in Jamaica, the country to which he would be deported (R.81) (108).

Petitioner also established that he has held gainful employment since his arrival in this country in 1971, having been steadily employed as a welder since 1973 (R.74), and that throughout this period, he has supported himself and his family, always paid his income taxes and has never required public assistance (R.75); and that he and his wife jointly own their home, valued at $80,000, but subject to a mortgage on which they make monthly payments (R.109), as well as monthly payments on their family car, a 1984 Honda Accord, valued at $12,000.(R.101).

Petitioner's wife testified that he is a good husband and a warm and loving father to his children (R.116), and that she did not have sufficient income to take care of her children or to make their

mortgage payments if her husband were to be deported (R.54-55).

Petitioner's mother, who is 67 years old and a widowed United States citizen, testified that her son is a good father to his children and a good son to her and visits her regularly (R.126).

Letters from four persons who know the petitioner in the community in which he lives, including an officer of the U. S. Federal Protective Services (R. 166), a dentist who has known the petitioner for more than four years (R.163), the coach of the Takoma Park (Maryland) Soccer Association with whom the petitioner has been associated as a player in a soccer club for four years (R.164), and the teacher of the petitioner's daughter, who has known the petitioner for three years, (R.165) attested to the petitioner's close relation and interest in his children, his attachment to the community, to his reputation and to his good moral character.

By way of mitigation of the narcotics charge, the petitioner testified regarding the circumstances

under which he was arrested, namely, that he had traveled to Florida to play in a soccer match (R. 76). The car in which he rode when he was stopped by the police had been rented by another person (R.78). He had been picked-up earlier by a fellow team member who was then driving the car but who asked him to take over the driving because of a soccer injury to the driver's ankle; He had been given a small quantity of cocaine for his personal use which was in his possession at the time of his arrest. He gave permission for the police officer to look in the trunk of the car. He had never looked in the trunk and had not known that a large quantity of marijuana was in the trunk (R.84).

He testified that he had pleaded not guilty to the charge of marijuana possession and was convicted of the possession of the small quantity of cocaine and possession "in excess of 20 grams of marijuana" (R.171). He was sentenced only to three years of supervised probation. He was not sentenced to any confinement in prison, nor was he required to pay a

fine (other than court costs of $20)(R.171).

He testified that he had not violated any of this country's immigration laws (R. 80) and that, other than the present conviction, he had not been convicted of any other crime (R.80), although arrested in Washington, D.C. in 1979, for possession and sale under the Uniform Narcotic Act, the sale charge was dismissed and that no formal charge was made as to possession (R.103,17). The petitioner admitted that he had been arrested in Maryland in 1981, together with other persons, and charged with gambling and with possession of a knife (R.172). Petitioner was found not guilty of gambling and, pursuant to Article 27, Section 641 of the Maryland Code, (R.173) was placed on probation without judgment on the charge of carrying a pocket knife.

An INS agent testified at the deportation hearing that the petitioner's conviction came to the attention of the INS because of a collateral investigation relating to a marijuana and cocaine smuggling ring which he described as the "Payne

Organization" (R.132,135). Under cross-examination, the agent admitted that there were no records of any kind in the possession of the INS to support his testimony regarding the existence of such an organization or that the petitioner had any connection with such a group (R. 137,138).

The immigration judge denied the petitioner's application for a waiver of inadmissibility and ordered the petitioner deported from the United States to Jamaica, (R.59).

On appeal, the Board of Immigration Appeals denied both a motion to remand for further evidence of the petitioner's rehabilitation since his deportation hearing and affirmed the decision by the immigration judge denying the application for a waiver and ordering the petitioner's deportation (R.1-5).

The Board of Immigration Appeals held that the immigration judge's denial of the waiver was appropriate because the petitioner's "criminal misconduct, especially that part involving controlled substances, to be a serious adverse factor" that (R.4) requires "a heightened showing of unusual or

outstanding equities" in order for Section 212(c) relief to be considered" (R.3). Referring to the petitioner's family ties within the United States, his residence of long duration in this country, testimony and affidavits regarding his good character, value and service to the community, his history of employment, the existence of property ties, evidence of hardship to the petitioner's wife and family if deportation should occur, and proof of rehabilitation through the successful completion of probation, the Board stated that the petitioner had presented "outstanding equities" that warrant its consideration as to whether a favorable exercise of discretion was warranted. However, it discounted his rehabilitation "in view of the serious nature of his conviction" and "his failure to accept responsibility for his actions or to express regret for the harm to his family and his community."

The Board concluded, "after carefully balancing the equities" that discretionary grant of Section 212(c) relief was not merited (R.4).

The Board also denied the petitioner's motion to remand for the taking of new evidence, not available at the time of the deportation hearing, to establish the petitioner's continuing rehabilitation, finding that "a remand in order to present further evidence of rehabilitation would serve no useful purpose".(R.5).

The court of appeals below affirmed the Board's decision, stating that "the Board focused on Payne's criminal involvement with controlled substances, finding these offenses 'to be a serious adverse factor that requires a heightened showing of unusual or outstanding equities in order for Section 212(c) relief to be considered."

The court held that [t]he decision of the Board will be disturbed only if it is arbitrary and capricious and constitutes an abuse of discretion. Blackwood, 803 F.2d at 1168; see INS v. Abudu, 485 U.S. _____, 99 L.Ed.2d 90, 102 (1988). Here, the Board carefully weighed Payne's evidence of hardship against the serious adverse factors. The decision

not to allow Payne discretionary relief from deportation cannot be characterized as an abuse of discretion."

REASONS FOR GRANTING THE WRIT

1. Questions regarding the exercise of discretion under the immigration and nationality laws have been before this Court frequently3/ but never for the issues presented by the decision below.

3/**Accardi v. Shaughnessy**, 347 U.S. 260 (1954) (Prejudgment); **Jay v. Boyd**, 351 U.S. 345 (1956) (Reliance upon confidential information for a discretionary denial of suspension of deportation); **Hintopoulos v. Shaughnessy**, 353 U.S. 72 (1957) (Reliance upon a subsequent act of Congress for a discretionary denial of suspension of deportation); **Dessalernos v. Savoretti**, 356 U.S. 269 (1958) (Determination of statute under which applicant is eligible to apply for suspension of deportation); **Kimm v. Rosenberg**, 363 U.S. 405 (1960) (Failure to meet burden of proof in seeking suspension of deportation not obviated by reliance upon Fifth Amendment privilege against self-incrimination); **Foti v. INS**, 375 U.S. 217 (1963) (Jurisdiction of court of appeals over application for suspension of deportation); Kleindienst v. Mandel, 408 U.S. 753 (1972) (Exercise of discretion to deny waiver for a nonimmigrant alien excludable under 8 U.S.C. 212(a)(28) as an advocate of the "doctrines of world communism;" INS v. Bargamashad, 429 U.S. 14 (1976) (Pretermission of issue of statutory eligibility in discretionary denial of application for suspension of deportation); **INS v. Wang**, 452 U.S. 139 (1981) (Requirement of judicial deference to INS determination of "extreme hardship" in denial of suspension of deportation); **INS v. Phinpathya**, 464 U.S. 183 (1984) (Statutory construction of "physical presence" requirement for eligibility for suspension of deportation; **INS v. Rios-Pineda**, 471 U.S. 444 (1985) (Discretionary denial of reopening of

Especially because the standard for judicial review of discretionary decisions is whether the administrative action is "arbitrary, irrational, or contrary to law", (Citizens to Preserve Overton Park v. Volpe, 401 U.S. 416 (1971)) the issues here are of fundamental importance to the decision-making process for the exercise of discretion conferred by the INA upon the Attorney General and to persons, such as the alien petitioner here, with a "protected interest".

See Roberts, "The Exercise of Administrative Discretion Under the Immigration Laws", 13 San Diego L. Rev. 144-155, (1975), in which the Chairman of the Board of Immigration Appeals from 1968 to 1974 observed:

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deportation proceedings for application for suspension of deportation where applicant has acquired the required presence in the United States by filing frivolous appeals); Jean v. Nelson, 472 U.S. 846 (1985) (Remand for determination "whether the actions of lower level (immigration) officials in the field conformed to the policy statements of the superiors in Washington" which require that the discretionary grant of parole be exercised upon a nondiscriminatory basis as to Haitian applicants); INS v. Abudu, 485 U.S. 94 (1988) (Motion to reopen proceedings to apply for asylum to be based upon abuse-of-discretion review)

" . . .[I]n view of the broad range of the discretionary authority confided to the Attorney General and his delegates, some standards are clearly needed to preclude arbitrary and capricious decision-making by the many delegates of the Attorney General exercising his discretion. The courts have held that discretion must be exercised on the individual facts of each case and have forbidden the prescription by the Attorney General of arbitrary classifications or lists of specific aliens to whom relief must be denied. Where the limitations on the grant of relief as a matter of discretion to aliens otherwise statutorily eligible have been prescribed by formal regulation, however, they have been sustained.

The absence of meaningful administrative standards as guides to adjudicators in the exercise of discretion has been noted and criticized in recent years. One judge has suggested that 'proper administration would be advanced and reviewing courts would be assisted if the Attorney General, or his delegate, without attempting to be exhaustive in an area inherently insusceptible of such treatment, were to outline certain bases deemed to warrant the affirmative exercise of discretion and other grounds. The Board has attempted to lay down general guidelines in its published decisions but the adjudicators have not all considered them as satisfactory."

2. In Matter of Marin, which involved the criminal sale of cocaine, the Board held that "[i]n view of

(the) disparate statutory treatment and the disfavor with which we view such offenses, we require a showing of unusual or outstanding countervailing equities by applicants for discretionary relief who have been convicted of serious drug offenses, particularly those involving the trafficking or sale of drugs." 16 I&N Dec. at 586, (Fn.4).

See also Matter of Buscemi, Int. Dec. 3058 (BIA 1988); Blackwood v INS, 803 F.2d 1165 (11th Cir. 1986), in which the 11th Circuit emphasizes that the requirement of unusual or outstanding countervailing equities reflects the strong Congressional policy against lenient treatment of drug traffickers. 8 U.S.C., 1101(a)(43); 1158(a), 1182(h); 1251(a)(4)(B); 1251(b); 1251(f)(2), 1252A(c); 1253(h)(2)(B); 1254(e)(2), 8 U.S.C. 944(c)(2).

3. Important questions are implicated here arising from the guidelines adopted by the Board, as applied to the petitioner whose conviction involved only simple possession, in determining his eligibility to Section 212(c) relief.

As Francis v. INS, 532 F.2d 268 (1976), has noted, citing the Government's brief there, the purpose of Section 212(c) reflects the concern of Congress that there be "some degree of flexibility to permit worthy returning aliens to continue their relationships with family members in the United States despite a ground for exclusion," supra, 532 F.2d 268, 271.

Narcotic offenses, set forth at Section 212(a)(23), are included within the scope of the Attorney General's discretion. See Section 212(c) which provides eligibility for relief "without regard to the provisions of paragraphs (1) through (25) and paragraphs (30) and (31) of subsection (a)" of Section 212 enumerating the grounds of exclusion thus explicitly including narcotics offenses.

The Board's error in holding that the petitioner's conviction of possession of cocaine in an unspecified amount and of marijuana of "more than 20 grams," is a "serious adverse factor which requires a heightened showing of unusual or outstanding equities", is underscored by other weighty concerns which warrant

review by this Court in determining whether the Board's decision here is "arbitrary, irrational, or contrary to law".

The point of departure for determining whether the decision below justifies review is the judgment of the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, which tried the petitioner on the narcotic charges.

What should have been of telling importance to an administrative Board of Immigration Appeals in the Executive Branch and to the appellate court below is the finding by the Florida trial court, which is vested with the quintessential function to determine the "seriousness of the offense" within Florida's statutory framework and, having heard the evidence leading to the conviction and having evaluated the probation report regarding the person to be sentenced, to fix the term of the sentence to be imposed. The court's judgment as to the petitioner found:

> "[Y]ou are not likely again to engage in a criminal course of conduct, and

> that the ends of justice and the welfare of society do not require that you should suffer the penalty authorized by law. . .
>
> It is therefore ordered and adjudged that the imposition of sentence is hereby withheld and that you are placed on probation for a period of three (3) years each count under the supervision of the Department of Corrections and its Officers, such supervision to be subject to the provisions of the laws of this State concurrent with each other (Court has objections to probation being transferred to Washington, D.C.)".

The error of the Board in defining the petitioner's offense as a "serious adverse factor requiring a showing of unusual or outstanding countervailing equities", dismissed sub silentio by the court below, is amplified by considerations which this Court has identified in Rochin v. California, 342 U.S. 165, 168, (1951):

> "In our federal system the administration of criminal justice is predominantly committed to the care of the States. The power to define crimes belongs to Congress only as an appropriate means of carrying into execution its limited grant of legislative powers. U.S. Const. Art. 1, Section 8, cl. 18. Broadly speaking, crimes in the United States

are what the laws of the individual States make them."

These limitations, in the main, concern not restrictions upon the powers of the States to define crime, except in restricted areas where federal authority has preempted the field, but restrictions upon the manner in which the States may enforce their penal codes. Accordingly, in reviewing a State criminal conviction under a claim of right guaranteed by the Due Process Clause of the Fourteenth Amendment, from which is derived the most far-reaching and most frequent federal basis of challenging State criminal justice, we must be deeply mindful of the responsibilities of the States for the enforcement of criminal laws, and exercise with due humility our merely negative function in subjecting convictions from state courts to the very narrow scrutiny which the Due Process Clause of Fourteenth Amendment authorizes."

5. The abuse of the discretion exercised by the Board of Immigration Appeals is manifested by its departure here from a precedential decision in Matter of Frentescu, 18 I&N Dec. 244 (BIA 1982) involving a determination of an application for asylum pursuant to 8 U.S.C. 1158, or alternatively, the withholding of deportation pursuant to 8 U.S.C. 1253(h)(2)(B), regarding a determination whether an alien, "having

been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States."

In that case, one of first impression, the Board held:

> "In judging the seriousness of a crime we look to such factors as the nature of the conviction, the circumstances and the underlying facts of the conviction, the type of sentence imposed, and most importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community. Crimes against persons are more likely to be categorized as particularly serious crimes. Nevertheless, we recognize that there may be instances where crimes . . . against property will be considered as such crimes." at 247.

The Board has egregiously departed from this guideline here, which makes its exercise of discretion all the more arbitrary. Since the Congressional purpose of Section 212(c) is to prevent the breakup of families in the United States, it must be regarded as at least as compelling a consideration as Congress "intended for Section 243(h)(2)(B) of the Act," cited by the Board as grounds there for not

assuming that a conviction of the crime of burglary is not necessarily a "particularly serious crime" as the term is used in the Immigration and Nationality Act.

The arbitrary character of the Board's decision is underscored by the fact that in Matter of Frentescu it was defining specific language chosen by Congress to reflect that "a particularly serious crime" is more serious than a "serious nonpolitical crime."

If the Board is to carry out the intent of Congress and the constitutional mandate required by Francis for the proper exercise of Section 212(c) discretion for deportable aliens, it must be regarded as arbitrary for it to impose more restrictive standards for "serious crimes" affecting members of families in the United States than it requires for "particularly serious crimes" for persons, seeking asylum or the withholding of their deportation, who have no families or other attachments in the United States.

6. This factor bears directly upon the issue whether the decision by the Board, with its impact

upon persons who have been found guilty only of simple possession of narcotic drugs is "arbitrary, irrational, or contrary to law" not only within the framework of the discretionary power reposed in the Attorney General, but in the context of the narcotic laws.

The national concern arising from the widespread use of narcotics is evidenced by the enactment of the Anti-Drug Abuse Act of 1988, Pub. L. 100-690, 102 Stat. 4181, and the recent establishment of the Office of National Drug Control Policy in the Executive Office of the President. See News Release by the Department of Health and Human Services on July 31, 1989, reporting the results of the National Household Survey on Drug Abuse, 1988, with accompanying statements by the Secretary of Health and Human Services, Louis W. Sullivan, and the Director of the Office of National Drug Control Policy, William J. Bennett, reporting that "within the past year" 28 million persons in the United States used marijuana, cocaine, or other illicit

drugs, and that almost 66 million Americans, or 33% of the population, age 12 and over, have tried marijuana, including all segments of society - -, black, white, Hispanic, the prosperous, the poor, college graduates, high school dropouts - - no segment has been immune." This population inevitably includes aliens who are permanent residents, whose deportation from the United States results in a devastating impact upon members of their immediate families.

This petition presents such a case.

The incidence of drug use in the United States has been reflected in the enforcement of the exclusion and deportation provisions of the Immigration and Nationality Act. The Statistical Yearbook of the Immigration and Naturalization Service for 1988. In (publication) reports that more than 4,500 persons have been excluded (371), deported (3,988), and required to depart. (223) for violations of the narcotics laws). No statistics are available regarding the nature of the violations, the number of

families which are being dismembered by the enforcement activities of the Immigration and Naturalization Service.

In the cohort of persons whose involvement with narcotic drugs is limited to their possession for personal use, the number of affected aliens and families is manifestly an important consideration by this Court for determining the validity of the additional barrier to the grant of 212(c) relief imposed upon permanent resident aliens convicted of the possession of narcotic drugs.

That the Board of Immigration Appeals erred in its classification of simple possession of narcotic drugs as a "serious drug offense" is indicated also by recent amendments to the Immigration and Nationality Act which have defined different classifications of narcotic offenses for the purpose of limiting benefits under the Act.

The Anti-Drug Abuse Act of 1988, supra, at Section 7432, as amended 8 U.S.C. 1101(a) to define the term "aggravated felony" to mean murder and drug or

firearms trafficking.

18 U.S.C. 924(c)(2) has defined different classifications of narcotic offenses for the purpose of limiting benefits under the Immigration and Nationality Act. "The term 'drug trafficking crime' means any felony conviction of Federal law involving the distribution, manufacture, or importation of any controlled substance as defined in Section 102 of the Controlled Substances Act (21 U.S.C. 802)."

Sections 7343-47(a) of the Anti-Drug Abuse Act amend the INA to include as an additional ground of deportability at Section 241(a)(4)(B), 8 U.S.C. 1251(a)(4)(B) conviction of "an aggravated felony at any time after entry;" to render a statutory finding at Section 242A(c), 8 U.S.C. 1252A(c); that "an alien convicted of an aggravated felony shall be conclusively presumed to be deportable from the United States;" to deny the opportunity of an alien convicted of an aggravated felony to depart the United States voluntarily pursuant to Section 244(e) of the INS, 8 U.S.C. 1254(e)(2).

Section 208 of the INA, 8 U.S.C. 1158(a) denies the authority of the Attorney General to waive excludability charges against aliens who have been found to have trafficked in narcotics and, at Section 243(h)(2)(B), 8 U.S.C. 1253(h)(2)(B), denies an otherwise qualified deportable alien the opportunity to apply for the withholding of deportation to a country in which he will be persecuted upon grounds of race, religion, nationality, membership in a particular social group, or political opinion, if the alien, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States."

These combined provisions establish that Congress has discretely distinguished various types of narcotic offenses. In none of the amendments to the INA has Congress defined possession of a controlled substance as the type of offense which should be invoked to deny a discretionary benefit to aliens who can establish equitable factors for remaining in the United States. See Hintopoulos v. Shaughnessy,

supra.

A substantial question is thus presented here as to whether the premise relied upon by the Board that the "disparate statutory treatment" of drug offenses and its "disfavor" of "such offenses" are proper grounds for determining that the simple possession of narcotic drugs is a "serious drug offense."

(7)(a) The Florida statute under which the petitioner was found guilty similarly reflects gradations of offenses and penalties under its laws which are also relevant for determining whether the petitioner has been convicted of a "serious drug offense" within the standards which Congress intended for the purpose of granting discretionary relief to "make worthy returning aliens to continue their relationships with family members in the United States." See Francis, supra at 532 F.2d 268-271.

Florida Statutes Annotated define offenses involving controlled substances as felonies in the first, second, and third degree and as misdemeanors, manufacturing, sales, purchases, delivery and

bringing into the State various types of narcotic drugs, and the possession of controlled substances of varying quantities ranging from 4 grams to more than 10,000 pounds.

The penalties for the different types of offenses include death or life imprisonment, with a minimum time to be served of no less than 25 years, for a "capital felony"; a term of imprisonment for life or for a term of not less than thirty years for a "life felony"; a term of imprisonment not exceeding 30 years for a felony of the first degree; a term of imprisonment not exceeding 15 years for a felony of the second degree; a term of imprisonment not exceeding 5 years for a felony of the third degree; a definite term of imprisonment not exceeding one year for a misdemeanor of the first degree; and a definite term of imprisonment of 60 days, and fines of $1,000.00 or $500.00 for a misdemeanor of the second degree.

7(b) In the light of this Court's dehortation in Rochin, supra (at 168) that "[b]roadly speaking, crimes in the United States are what the laws of the

individual states make them," and of the Board's precedential decision in Matter of Frentescu, supra, that the determination of the "seriousness of a crime" must include consideration of the "type of sentence imposed" and "most importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community." (at 247). It is an abuse of discretion for the Board to have held that the petitioner's conviction for possession of narcotic drugs is a "serious drug offense."[4]/

See especially the Board's finding in Frentescu that "the applicant received a suspended sentence after spending a relatively short period of time in prison (3 months). Such sentence, as viewed by the state circuit court judge reflects upon the seriousness of the applicant's danger to the community."

No different standard should apply to the petitioner here based upon the record before the Board which establishes explicitly that the state circuit court judge withheld sentence of confinement and imposition of a fine against the petitioner,

stating that the petitioner is not likely again to engage in a criminal course of conduct and that the ends of justice and welfare of society do not require that he should suffer the penalty authorized by law, thus reflecting upon the "seriousness of the offense" and the petitioner's danger to the community.

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[4] Although in its decision, the Board recounted unsupported testimony of a special agent of the Immigration and Naturalization Service regarding the petitioner's identification as "an operative of an organization believed to be transporting cocaine and marijuana in rented cars from Florida to Washington, D.C. area," that testimony is not corroborated or supported by any other evidence. The Board also referred to a charge against the petitioner for the sale of narcotics in 1979, but the record reflects that this charge was dismissed as well as another charge of gaming. The only conviction other than of the conviction of possession of narcotic drugs by the Florida Court, is one for carrying a "concealed weapon (a knife)" for which he was sentenced to 6 months probation in 1981.

Whatever significance the unsupported testimony of the INS agent and the other offenses noted in the Board's decision may have, if they are entitled to any consideration, at most it is for the "weighing of equities" for the grant of discretionary relief. They do not bear upon the question whether the petitioner's conviction of possession of narcotic drugs may be regarded as a "serious drug offense", which thereafter triggers the Board's determination whether the petitioner has established" unusual or outstanding countervailing equities" for the grant of Section 212(c) relief.

8. Certiorari should also be granted to determine the scope of judicial review of administrative decisions by the Board of Immigration Appeals.

The court of appeals below cited in support of its decision two cases, Tapia-Acuna v. INS, 640 F.2d 223 (9th Cir. 1981) and Blackwood v. INS, 883 F.2d 1165 (11th Cir. 1986), involving convictions of trafficking and sale of narcotic drugs, not, as here, a conviction only of possession, and INS v. Abudu, 485 U.S. 94 (1988), as its standard for judicial review.

The reliance by the court below upon Tapia-Acuna and Blackwood reflects no consideration of the issues raised in the petition for judicial review.

Nor was any suggestion made that the review by the appellate court must be based on any standard other than that for determining abuse of discretion.

What is relevant here, as distinguished from Abudu, is that there is no issue here involving a discretionary decision to reopen a deportation proceeding. Instead, the petitioner's application was timely filed in the deportation proceeding itself. The issue of "abuse of discretion" is not

one based upon newly-discovered evidence by an applicant for asylum who had entered the United States as a nonimmigrant student and who had not "reasonably explained his failure to apply for asylum initially."

The petition here raises substantial questions as to whether an alien, who has been a permanent resident of the United States since 1971, may be denied discretionary relief upon the basis of an administrative finding that his conviction of possession of narcotic drugs is a "serious offense", notwithstanding a finding by the trial court which convicted the petitioner of the offense, which, under the Board's prior precedential holdings, established that the offense of simple possession is "not serious", and notwithstanding provisions of federal statutes which deny discretionary benefits to aliens who have been convicted of offenses involving manufacturing, trafficking and selling narcotic drugs but imposing no restrictions upon the grant of discretionary relief to aliens who have been convicted only of possession.

The issues here are manifestly different from those raised in Abudu. The citation of Abudu as the basis for its disposition of the order of deportation by the Board of Immigration Appeals reinforces the contention here that the opinion of the Court of Appeals reflects no consideration of the important questions presented.

In view of the issues raised in the petition to review the decision of the Board of Immigration Appeals, a more "thorough, probing, in-depth" review is required here than was accorded by the sub silentio treatment of the questions in the decison by the Fourth Circuit. Citizens to Preserve Overton Park v. Volpe, supra, 401 U.S.C. 416 (1971).

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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The assistance of Ladan Mirbagheri Smith, Esq. is acknowledged.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 88-2207

WILLIAM GEORGE PAYNE

PETITIONER,

v.

U.S. IMMIGRATION & NATURALIZATION SERVICE

RESPONDENT,

On Petition for Review of an Order of the Immigration and Naturalization Service.

Argued: June 8, 1989 Decided: July 14, 1989

Before HALL and WILKINS, Circuit Judges, and MICHAEL, United States District Judge for the Western District of Virginia, sitting by designation.

PER CURIAM:

William George Payne petitions for review of an order of the Board of Immigration Appeals denying him relief from deportation. We affirm.

Payne, a permanent resident alien from Jamaica who entered the United States in 1971, was convicted in Florida state court in 1985 of possession of cocaine and marijuana and sentenced to three years probation. In February 1985 deportation proceedings were instituted against Payne pursuant to Section 241(a)(11) of the Immigration and Nationality Act, 8 U.S.C.A. 1251(a)(11) (West 1970 & Supp. 1989), which provides for the deportation of any alien convicted of a controlled substance offense after entering the United States.

Payne did not contest deportability at his hearing, but instead sought a waiver under Section 212(c) of the Act, 8 U.S.C.A. 1182(c) (West 1970). Pursuant to this section an alien who has been a United States resident at least seven years may be granted discretionary relief from deportation if he demonstrates that the equities of allowing his

continued presence in the United States outweigh the negative factors. See Tapia-Acuna v. INS, 640 F.2d 223 (9th Cir. 1981); Blackwood v. INS, 803 F.2d 1165 (11th Cir. 1986).

Following the decision of an immigration judge denying Payne relief, the Board of Immigration Appeals affirmed the denial of discretionary relief and dismissed Payne's appeal. The Board reasoned, "after carefully balancing the equities," that Payne was not entitled to relief from deportation. In reaching this conclusion the Board focused on Payne's criminal involvement with controlled substances, finding these offenses "to be a serious adverse factor that requires a heightened showing of unusual or outstanding equities in order for Section 212(c) relief to be considered."

The decision of the Board will be disturbed only if it is arbitrary and capricious and constitutes an abuse of discretion. Blackwood, 803 F.2d at 1168; see INS v. Abudu, 485 U.S. _____, 99 L.Ed.2d 90, 102 (1988). Here, the Board carefully weighed Payne's

evidence of hardship against the serious adverse factors. The decision not to allow Payne discretionary relief from deportation cannot be characterized as an abuse of discretion.

AFFIRMED.

APPENDIX B

JUDGMENT

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

No. 88-2207

WILLIAM GEORGE PAYNE

Petitioner

v.

U.S. IMMIGRATION & NATURALIZATION SERVICE

Respondent

On Petition for Review of an Order of the Immigration and Naturalization Service

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THIS CAUSE came to be heard upon the petition of William George Payne for review of an order issued by on 10/31/1988; and upon the certified record; and the said cause was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit, that the order be, and it is hereby Affirmed.

CLERK

APPENDIX C

U.S. DEPARTMENT OF JUSTICE
Executive Office of Immigration Review
Date: October 31, 1988

File: A31 304 9999 - Baltimore

In re: WILLIAM GEORGE PAYNE

IN DEPORTATION PROCEEDINGS APPEAL AND MOTION

CHARGE

Order: Sec. 241(a)(11), I&N Act [8 U.S.C. 1251(a)(11)] - Convicted of a controlled substance violation

APPLICATION: Waiver of inadmissibility; remand

This is an appeal from the decision of an immigration judge dated May 16, 1986, finding the respondent deportable as charged, denying his application for waiver of inadmissibility under Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c), and ordering him deported from the United States to Jamaica. The respondent filed a timely appeal, and subsequently, a motion to remand. The appeal will be dismissed. The motion to remand is denied. The request for oral argument before the Board is also denied.

The respondent is a 35 year old native and citizen of Jamaica who was admitted to the United States on

May 21, 1971, as a lawful permanent resident. He was convicted on April 18, 1985, in the Fifteenth Judicial Circuit Court of Palm Beach County, Florida, after a jury trial, of possession of cocaine and possession of marijuana in excess of 20 grams. He was sentenced to probation for a period of 3 years. Based on this conviction, the Immigration and Naturalization Service issued an Order to Show Cause charging the respondent with deportability under Section 241(a)(11) of the Act, as an alien convicted of a violation relating to controlled substances. At his deportation hearing, the respondent, through counsel, admitted the factual allegations contained in the Order to Show Cause and conceded deportability but requested relief from deportation under Section 212(c) of the Act.

Section 212(c) of the Act provides that aliens lawfully admitted for permanent residence who temporarily proceed abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years or more, may be admitted to the United States

in the discretion of the Attorney General without regard to certain specified grounds for exclusion enumerated in Section 212(a) of the Act. The grounds specified provide for the exclusion of aliens who, like the respondent, have been convicted of offenses involving controlled substances and are excludable under Section 212(a)(23) of the Act.

The Section 212(c) waiver is applicable not only in exclusion proceedings but also in deportation proceedings where the alien has not departed from the United States subsequent to the acts that rendered him excludable. See Francis v. INS, 532 F.2d 263 (2d Cir. 1976); Matter of Silva, 16 I&N Dec. 26 (BIA 1976). However, mere eligibility for a Section 212(c) waiver does not automatically entitle the alien to such relief. Instead, the Attorney General, or his delegate, is required to determine, as a matter of discretion, whether an application merits the relief sought. The alien bears the burden of demonstrating that he merits favorable consideration. Matter of Marin, 16 I&N Dec. 581 (BIA 1978).

The exercise of discretion in a particular case requires consideration of all the facts and circumstances involved. There must be a balancing of the adverse factors evidencing the alien's undesirability as a permanent resident against the social and humane considerations presented in his favor. This Board has enunciated several such facts to be considered in determining whether an applicant warrants Section 212(c) relief. Among the facts deemed favorable to an applicant are the presence of family ties within the United States, residence of long duration in this country, evidence of hardship to the alien and his family if deportation occurs, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to an alien's good moral character. Matter of Marin, supra, at 584-85. Adverse factors include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant

violations of this country's immigration laws, the existence of a criminal record, and, if so, its nature, recency, and seriousness, and the presence of other evidence indicative of an applicant's bad character or undesirability as a permanent resident of this country. Matter of Marin, supra, at 584. As the negative factors grow more serious, it becomes incumbent upon the applicant to present additional offsetting favorable evidence in his behalf to show he warrants a favorable exercise of discretion. There may be cases, however, where the nature of the adverse factors, in themselves, is such as to be ultimately determinative of whether Section 212(c) relief is warranted. Matter of Buscemi, Interim Decision 3058 (BIA 1988).

The respondent was convicted in 1985 in Florida of possession of marijuana in excess of 20 grams. He was sentenced to probation for 3 years. A special agent of the Immigration and Naturalization Service testified that he investigated the respondent for deportation proceedings. The respondent first came

to the agent's attention through a multiagency investigation involving the Washington, D.C., Police Department, the Prince George's County, Maryland, Police Department, the Bureau of Alcohol, Tobacco, and Firearms, the Department of the Treasury, and the Immigration and Naturalization Service. The respondent was identified as an operative in an organization believed to be transporting cocaine and marijuana in rented cars from Florida to the Washington, D.C., area. The respondent's arrest record in fact indicates that the rented car driven by the respondent was stopped on the Florida Turnpike for traffic violation. During the stop, the respondent attempted to throw away a plastic bag containing cocaine. In the trunk of the car, police officers discovered four bales (approximately 227 pounds) of marijuana. The respondent was ultimately convicted of marijuana in excess of 20 grams. He continues to maintain his innocence, claiming he was unaware of the contents of the trunk prior to his arrest.

With respect to other adverse factors, the respondent was also arrested in 1979 and charged with sale of narcotics, but those charges were dismissed. On May 28, 1981, the respondent was convicted in the District Court of Prince George's County, Maryland, of carrying a concealed weapon (a knife), and was sentenced to 6 months probation. A charge of gaming (playing dice for money) was disposed nolle prosequi. We find the respondent's criminal misconduct, especially that part involving controlled substances, to be a serious adverse factor that requires heightened showing of unusual or outstanding equities in order for Section 212(c) relief to be considered. Matter of Buscemi, supra.

The respondent was 17 years of age when admitted to the United States and has resided continuously in this country for 17 years. He is married to a United States citizen and has six dependent United States citizen children. His mother and brother are also United States citizens, and four other brothers and sisters are lawful permanent residents. The family

resides in close proximity and they have frequent contact with each other.

The respondent has been gainfully employed since his arrival to this country in 1971. From 1971 to 1973 he worked as a salesman in a department store. Since 1973, he has been steadily employed as a welder, has always supported his family, has always filed income taxes, and has never been on public assistance. The respondent and his wife own their own home and car, and most recently the respondent entered into a partnership with two other individuals, and they jointly own and operate a retail business.

The respondent and his family stand to suffer great hardship if the respondent is deported. Although his wife works part-time as a hairstylist, it is the respondent who maintains the household and contributes to the support of his mother. The respondent testified that although he travels to Jamaica every year for vacation, he has no close family remaining there and will not be able to make

enough money to support his family. Finally, the respondent is under the care of a physician for treatment of an antral ulcer.

The respondent's mother testified that the respondent is a good son and the family would suffer without him. His wife testified that the respondent is a good husband and father and that they will miss him if he has to return to Jamaica. The record contains a letter from their daughter's teacher stating that the respondent is a loving father who is interested in his children's progress in school and is always willing to assist the teacher. The record also contains letters from the respondent's dentist and a federal protection officer, who is a friend. They know the respondent to be a courteous, respectful individual and a person of good moral character who contributes in a positive way to his friends and family. The respondent is also a player on a Takoma Park Soccer Association Team.

The respondent has presented outstanding equities that warrant our consideration as to whether a

favorable exercise of discretion is warranted in this case. We conclude, after carefully balancing the equities, that a discretionary grant of Section 212(c) relief is not merited.

The respondent stands convicted of a serious drug offense and the amount of marijuana involved was substantial. Further, the record indicates that charges have been brought against the respondent in the past in connection with the sale of narcotics.

While the respondent admitted casual use of both marijuana and cocaine, he denies involvement in trafficking and testified that he will never use drugs again or engage in any other criminal activity.

The respondent claims that he is now rehabilitated. He submitted a letter from his probation officer stating that his period of probation has successfully expired. He testified that he wants the opportunity to remain in this country and work and raise his children. In view of the serious nature of the respondent's conviction and his failure to accept responsibility for his actions or to express regret

for the harm to his family and his community, we find his affirmations of change and his completion of probation to be insufficient evidence of rehabilitation. Moreover, while rehabilitation is another favorable consideration in the discretionary evaluation, a respondent with a criminal record, such as the respondent's, is ordinarily required to make a showing of rehabilitation before relief will be considered. In the instant case, even assuming that rehabilitation has been established, we conclude that the respondent has not sustained his burden of establishing that a favorable exercise of discretion is warranted. A remand in order to present further evidence of rehabilitation would serve no useful purpose. The motion to remand is therefore denied.

While the respondent will experience some hardship upon deportation due to his long period of residence in the United States and his family ties, this hardship does not overcome the negative factors of record. See Matter of Wadud, Interim Decision 2980 (BIA 1984). The respondent was not an infant when

admitted to the United States and although he has lived in this country for 17 years, he visits Jamaica annually. There is no evidence in the record that his ulcer cannot be properly treated in Jamaica.

The responsibility for the regrettable consequences to the respondent and his family from his deportation rests solely with the respondent. We conclude that the equities presented in his behalf do not outweigh the negative factors of record so as to support a grant of Section 212(c) relief. Accordingly, the decision of the immigration judge is affirmed and the appeal is dismissed.

ORDER: The appeal is dismissed.

FOR THE BOARD